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No. 90-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KAISER CEMENT CORPORATION,
Petitioner,

v.

LAKE ASBESTOS OF QUEBEC, LTD., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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March 1, 1991

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QUESTIONS PRESENTED

1. To facilitate maintenance of a nationwide Rule 23(b)(3) diversity class action against more than fifty defendants, may a district court evade established limitations on its subject matter jurisdiction

> (a) by deferring elimination of class members whose claims are not even alleged to satisfy the amount in controversy requirement of 28 U.S.C. § 1332(a);
>
> (b) by relying on a supposed Rule 23(b)(3) exception to the complete diversity of citizenship requirement of 28 U.S.C. § 1332(a) in order to entertain claims of non-diverse class members;
>
> (c) by declaring the common law "local action" restriction inapplicable to tort claims for damage to real property located outside the forum state;

and then, in disregard of those jurisdictional limitations, enter final judgment dismissing with prejudice the claims of all class members against a settling defendant?

2. Where a judgment approving a partial class settlement imposes obligations on class members as compensation for non-settling defendants' loss of state law contribution rights, do non-settling defendants have standing to raise defects in the Rule 23(e) settlement approval procedures that could render those compensatory undertakings unenforceable against class members?

LIST OF INTERESTED PARTIES

The following parties appeared before the United States Court of Appeals for the Third Circuit in this proceeding: Lac d'Amiante du Quebec, Ltee; School District of Lancaster (Pennsylvania); Manheim Township School District (Pennsylvania); Lampeter-Strasburg School District (Pennsylvania); Barnwell School District No. 45 (South Carolina); Board of Education of the Memphis City Schools (Tennessee); and the national class of entities who own or operate, in whole or in part, public and non-profit private elementary and secondary schools. Kaiser Cement Corporation has never been provided a list of all of the class member parties.

The ultimate parent company of Kaiser Cement Corporation is Hanson PLC. The only non-wholly owned subsidiary or affiliate of petitioner Kaiser Cement Corporation is Underwriters Service, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Kaiser Cement Corporation ("Kaiser Cement") respectfully prays that a writ of certiorari issue to review the judgment and majority opinion of a panel of the United States Court of Appeals for the Third Circuit, which affirmed a partial final judgment of the United States District Court for the Eastern District of Pennsylvania dismissing with prejudice the asbestos-in-school buildings claims of all members of a national, diversity-based Rule 23(b)(3) class against settling defendant Lake Asbestos of Quebec, Ltd., now known as Lac d'Amiante du Quebec Ltee ("LAQ").

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Third Circuit, reproduced as Appendix A at 1a-20a, are reported at 921 F.2d 1330. The opinion of the United States District Court for the Eastern District of Pennsylvania, dated February 16, 1990,

is reproduced as Appendix B at 21a-26a and is not reported. The judgments of the Court of Appeals and of the District Court are reproduced as Appendix C and Appendix D, respectively, at 27a-29a and 30a-33a. On subject matter jurisdiction issues, the majority and dissenting opinions of the Court of Appeals referenced opinions entered simultaneously in separate proceedings on petitions for writs of mandamus, reproduced as Appendix E at 34a-76a and reported at 921 F.2d 1310. The unreported opinion of the United States District Court for the Eastern District of Pennsylvania, dated November 14, 1989, which was the subject of the mandamus proceedings, is reproduced as Appendix F at 77a-82a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 1990. Kaiser Cement's timely petition for rehearing and suggestion for rehearing *en banc* was denied by an order dated January 9, 1991, reproduced as Appendix G at 83a-86a. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

At the time plaintiffs filed the underlying lawsuits, the applicable diversity jurisdiction statute, 28 U.S.C. § 1332(a) (1982), read in pertinent part as follows:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States; . . . .

STATEMENT OF THE CASE

1. This Petition Arises From The Massive "Asbestos School Litigation."

Plaintiff public school districts in the three consolidated complaints below have invoked the district court's diversity jurisdiction under 28 U.S.C. § 1332(a) to adjudicate state-law tort and warranty claims, which are based on the contention that the presence of a host of different "friable" asbestos-containing construction materials, such as fireproofing or boiler insulation, installed in school buildings over a period of more than seventy years has caused damage to those buildings.[1] The district court subsequently designated all of the plaintiffs named in the three complaints as representatives of a nationwide Rule 23(b)(3) class defined to include all entities that "own or operate in whole or in part" any public or non-profit private elementary or secondary school.[2] The more than fifty defendants against whom this class was certified to proceed are some of the companies that manufactured or installed asbestos-containing construction products or that mined and supplied the asbestos used in such products.

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[1] The first complaint ("Lancaster Complaint") was filed in the United States District Court for the Eastern District of Pennsylvania on January 17, 1983 by three Pennsylvania school districts who contended that all defendants were jointly liable because of an alleged conspiracy or concert of action. Two virtually identical complaints were subsequently filed in the Eastern District of Pennsylvania by non-Pennsylvania school districts—one located in South Carolina ("Barnwell Complaint") and another in Tennessee ("Memphis Complaint").

[2] The notice of the class action litigation is reproduced as Appendix H at 87a-93a and sets forth the district court's definition of the class. The notice also identifies the class representatives as the named plaintiffs in the three consolidated lawsuits and lists the defendants from all three complaints.

After the Court of Appeals affirmed the LAQ final judgment, the district court on December 17, 1990, redefined the class to include only those entities whose schools contain "friable" asbestos-containing materials. The district court concluded that notice of this redefinition need not be sent to the class.

Together they are either incorporated or have their principal places of business in a substantial number of states.

2. Following Extensive Proceedings, The District Court Ruled That No Subject Matter Jurisdiction Deficiencies Prevented It From Reaching The Merits.

After notice of the class action certification had been mailed to over 36,000 public school districts and private schools appearing on a commercially generated list and more than 1,500 class opt-outs had been identified, a number of defendants challenged the district court's subject matter jurisdiction to adjudicate the class action. These challenges raised three jurisdictional issues:

i. Plaintiffs' complaints did not allege that each member of the Rule 23(b)(3) class had a claim in excess of $10,000 as required by 28 U.S.C. § 1332(a) and by *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). In addition, the factual record demonstrated that at least sixty percent of the class members appeared to have jurisdictionally insufficient claims.

ii. Plaintiffs' complaints disclosed that the citizenship of each named plaintiff and each plaintiff class member was not diverse from that of each defendant as required by 28 U.S.C. § 1332(a) and by an unbroken line of Supreme Court decisions dating from *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

iii. The "local action doctrine," applied in decisions such as *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105 (1895), precluded exercise of jurisdiction over claims for alleged damage to real property located outside of Pennsylvania.

The district court's initial consideration of these jurisdictional challenges focused on the amount in controversy issue and led to an order directing plaintiffs to file amended complaints "to correct the existing pleading deficiencies." In response, plaintiffs then filed amended complaints alleging that "all members of the class (except a minimal

portion thereof), have claims in excess of $10,000 . . . ." App. 56a n.2.

In light of the admission in the amended complaints that some members of the Rule 23(b)(3) class—the purported "minimal portion"—could not satisfy the amount in controversy requirement, defendants renewed their jurisdictional motions and their showing that sixty percent of the class had insufficient claims. Additionally, defendants emphasized that this Court's recent decision in *Finley v. United States*, 490 U.S. 545 (1989), confirmed what had been apparent in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978), and in *Zahn v. International Paper Co.*—no theory of ancillary or pendent party jurisdiction could empower the district court to exercise diversity jurisdiction where, as here, complete diversity of citizenship did not exist between the class member plaintiffs and the defendants.

On November 14, 1989, the district court rejected each of defendants' jurisdictional challenges. Without articulating any statutory or theoretical underpinning for its decision, the court held that Rule 23(b)(3) class actions were not subject to the requirement of complete diversity of citizenship. App. 81a. The district court also held that the local action doctrine did not apply to claims for monetary damages sounding largely in tort that are "not bound to any issues of title or possession of real property." App. 82a.

As to the amount in controversy requirement, the district court ignored the amended complaints' affirmative allegation that some members of the Rule 23(b)(3) class did not have claims in excess of $10,000, but acknowledged that defendants had made a showing that sixty percent of the class had claims for less than the statutory minimum and that the identity of such class members was unknown. App. 80a-81a. Rather than requiring plaintiffs to identify and dismiss those class members with jurisdictionally insufficient claims before proceeding to the merits, however, the court determined that Fed. R. Civ. P. 12(d) au-

thorized deferral of a jurisdictional determination and concluded that the defects

> can be cured at trial by entering final judgment at the damages stage of the trial only against those plaintiffs that have sustained the burden of proving damages in excess of $10,000. App. 79a.

The district court was then requested to certify its jurisdictional rulings for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). When those requests were denied, several defendants filed petitions for an extraordinary writ in the Third Circuit Court of Appeals seeking to restrain the district court from acting further before properly establishing its subject matter jurisdiction. These petitions were denied on December 13, 1990. App. 38a-39a.

3. Over Objection, The District Court Entered Final Judgment Dismissing With Prejudice All Claims Against Settling Defendant LAQ.

In the midst of the subject matter jurisdiction controversy, the class reached a $1 million settlement with LAQ, one of the defendants herein, that had mined and sold asbestos fibers that were incorporated into some of the asbestos-containing products at issue. As required by Rule 23(e), the district court scheduled a hearing to consider objections to the settlement and authorized plaintiffs to mail class members an abbreviated description of the settlement agreement that supposedly would enable them to participate meaningfully in the scheduled hearing.[3]

Prior to the Rule 23(e) hearing, Kaiser Cement filed an objection to the district court reaching a merits resolution of the claims against LAQ before plaintiffs had corrected subject matter jurisdiction defects and pointed out that entry of final judgment against all class members was

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[3] The settlement notice is reproduced as Appendix I at 94a-103a. Among other omissions, this notice did not advise class members of plaintiffs' intention to secure an immediate partial final judgment of dismissal.

inconsistent with the court's November 14, 1989 ruling that only class members who proved damages in excess of $10,000 at trial would be subject to final judgment. Kaiser Cement also objected that the procedures adopted to notify the class of the proposed settlement were seriously flawed and that those flaws jeopardized the settlement's binding effect on absent class members, which in turn adversely affected non-settling defendants' contribution rights under the applicable laws of many states.

The district court's February 16, 1990 opinion dealing with the LAQ settlement found that class members "agree to adjust any subsequent recovery from non-settling defendants by any portion of the recovery attributable to LAQ," concluded that non-settling defendants' contribution rights were not prejudiced and, on that basis, held that Kaiser Cement lacked standing to object. App. 21a & 26a. The court then approved the $1 million LAQ settlement as adequate for the class and, without even addressing the subject matter jurisdiction deficiencies, entered a final judgment pursuant to Fed. R. Civ. P. 54(b) that dismissed with prejudice the claims of all members of the class against LAQ. App. 31a-33a. Kaiser Cement timely appealed that final judgment to the Third Circuit Court of Appeals.

4. A Sharply Divided Third Circuit Panel Affirmed The Final Judgment.

A. The Majority Found That Jurisdiction In The District Court Was "Proper," While The Dissent Concluded That The Case Must Be Dismissed.

On December 13, 1990, a Third Circuit panel majority denied Kaiser Cement's appeal and affirmed the district court's final judgment dismissing all class members' claims against LAQ with prejudice. App. 29a. On the same day, the same majority rejected the petitions of other defendants for a writ of mandamus directed at the district court's November 14, 1989 subject matter jurisdiction ruling. App. 38a-39a. Relying on its mandamus decision, the

majority did not require plaintiffs to establish the district court's jurisdiction to enter final judgment as to LAQ.

> We determined in *In Re School Asbestos Litig.*, ___ F.2d ___ (3d Cir. 1990) (Nos. 90-1125, 90-1126, 90-1185, 90-1199) (filed on this date) that the defendant petitioners had not met their burden of showing a "clear and indisputable lack of subject matter jurisdiction in the district court." Thus, jurisdiction in the trial court was proper based on 28 U.S.C. § 1332. App. 5a-6a.

However, in the referenced mandamus opinion, the majority had not actually determined that subject matter jurisdiction was proper in the district court, at least as to the amount in controversy requirement of 28 U.S.C. § 1332(a). Rather, it simply held that there was no clear obligation to be enforced by mandamus because "the district court had the discretionary authority to delay until trial" resolution of amount in controversy defects appearing on the face of the complaints. App. 47a-48a.

The majority's mandamus decision did reach and reject defendants' contention that the local action doctrine limited the trial court's jurisdiction and essentially adopted the district court's conclusion that the doctrine did not apply to tort causes of action for damage to real property where questions of title or possession were not involved. App. 52a & 53a-54a.

Finally, in addressing the lack of complete diversity of citizenship, the majority's mandamus opinion contended that "Congress's support of diversity-based class actions" was manifested by the legislature's 1988 decision not to do away with virtually all diversity jurisdiction and by the absence of any legislative attempt in 1988 to eliminate diversity class actions. App. 51a-52a. Based on that "support" and in an apparent effort to preserve the availability of such class actions on a nationwide scale, the majority concluded that Rule 23(b)(3) classes were the beneficiaries of a special jurisdictional rule: "only the citizenship of the named class representatives must be diverse from that of

the defendants." App. 48a. The majority's mandamus opinion did not identify any authority for this special jurisdictional rule, beyond citing to dicta in *Snyder v. Harris*, 394 U.S. 332, 340 (1969), and to the decision in *In Re Agent Orange Product Liability Litigation*, 818 F.2d 145, 162 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

In the Court of Appeals mandamus proceedings, Circuit Judge Cowen dissented from the majority's rulings on the amount in controversy and complete diversity of citizenship issues. App. 54a-76a. First, Judge Cowen focused on the directive in *Zahn v. International Paper Co.* that "every plaintiff in a Rule 23(b)(3) class action must independently satisfy the amount in controversy requirement of section 1332(a)." App. 55a. He stressed that "defendants have introduced uncontradicted evidence that when this case was filed as much as 60% of the plaintiff class did not have" claims in excess of $10,000 and that "plaintiffs have admitted in their amended complaints that some plaintiffs cannot in good faith allege claims in excess of $10,000." App. 56a-57a. In the face of plaintiffs' admission, he found unprecedented the decision to postpone correction of this known pleading infirmity until the damage phase of trial, particularly when the district court would continue to make merits rulings affecting all class members in the interim. App. 67a.

Second, on the complete diversity of citizenship issue, the dissent could find no statutory support for the majority's special Rule 23(b)(3) class action exception and therefore concluded that, if such an exception was based on anything, it must be some theory of pendent party jurisdiction. App. 69a n.9. Judge Cowen acknowledged that the earlier decision of the Second Circuit Court of Appeals in the *Agent Orange* litigation supported plaintiffs' theory of a special jurisdictional rule, but found that "its vitality has been totally undermined" by *Finley v. United States*, 490 U.S. 545 (1989). App. 74a-75a. Accordingly, Judge Cowen concluded that Rule 23(b)(3) class actions, like other lawsuits, must satisfy the requirement of complete diversity of citizenship.

> In light of Supreme Court precedent that has consistently refused to read 28 U.S.C.A. § 1332(a) as containing an authorization for federal courts to exercise pendent-party jurisdiction over parties where complete diversity is lacking, I conclude that the district court must dismiss these cases for lack of subject matter jurisdiction. App. 75a.

The above-quoted observations of Circuit Judge Cowen were authored in his dissent in the mandamus proceedings where several defendants sought to restrain the district court from proceeding further on the merits until plaintiffs had cured the jurisdictional defects. In the LAQ appeal, Judge Cowen was confronted with the ultimate merits decision—dismissal of class members' claims against LAQ with prejudice. He thus adopted his mandamus dissent together with the following additional reminder:

> [P]recedent requires that we resolve jurisdictional questions before we dispose of a case on the merits. Here the district court must dismiss those plaintiffs with jurisdictionally insufficient or inappropriate claims before it can enter final judgment against any defendant. App. 20a.

B. The Majority Affirmed The District Court's Ruling That Non-Settling Defendants Lacked Standing To Raise Defects In The Settlement Approval Process, While The Dissent Found That The Failure To Confront Such Defects Was "Patently Unfair."

Kaiser Cement's appeal also raised several defects in the notice procedures leading up to the district court's approval of the class settlement with LAQ. As summarized in the dissenting opinion, they included: (i) the settlement notice had not apprised class members of the district court's ruling that only those who proved jurisdictionally sufficient claims would be subject to the court's jurisdiction; (ii) the notice had failed to inform class members of the significance of the agreement to reduce future judgments against non-settling defendants in that this obli-

gation was not limited to the $1 million paid by LAQ in settlement; and (iii) notice of the settlement had not been mailed to all class members. App. 18a-19a.

The dissent also recognized that, in many jurisdictions, LAQ's settlement "extinguishes contribution and indemnity rights of joint tort feasors" by operation of law. App. 14a. Because of the effect of such state laws and the defects in the settlement approval process, Judge Cowen foresaw that "the non-settling defendants could find that they have received an unenforceable right to a diminution of a judgment in favor of the plaintiff class in exchange for their lost rights to indemnity and contribution from the settling defendant." App. 19a.

Notwithstanding Judge Cowen's demonstration that mere approval of the settlement deprived non-settling defendants of contribution rights as a matter of law in many states, the majority simply recited that the district court's order itself "contains no ruling purporting to limit any claims non-settling defendants may have" (App. 10a) and seemed to agree with the district court that non-settling defendants' rights were sufficiently safeguarded by the undertaking that class members would reduce future judgments against such defendants. App. 8a-10a. Accordingly, the Court of Appeals declined to "reach the issue of whether adequate procedures were followed in the settlement approval process," finding that non-settling defendants lacked standing to raise the issue. App. 10a.

REASONS FOR GRANTING THE WRIT

The partial final judgment affirmed below presents two important issues that potentially will arise whenever there are attempts to adjudicate massive numbers of state law claims against dozens of defendants in a single federal diversity proceeding by means of Rule 23(b)(3) class procedures: first, whether such class actions are subject to the same established limitations on district court jurisdiction as other lawsuits; and second, whether in such actions, potentially injured defendants will be permitted to assure

the binding effect of any final judgment by objecting to the failures of class representatives to follow procedures which are designed to protect absent class members.

The fundamental principle that federal district courts are empowered to exercise jurisdiction only to the extent authorized by the Constitution and by Congress has previously been viewed as an obstacle to the routine use of broad, diversity-based Rule 23(b)(3) class actions in the absence of the enactment of additional authorizing legislation. In fact, non-legislative efforts to overcome such jurisdictional obstacles were twice rejected shortly after the Federal Rules were amended in 1966 to create the modern Rule 23(b)(3) class action. *See Snyder v. Harris*, 394 U.S. 332 (1969) (rejecting aggregation of class members' claims to meet amount in controversy requirement) and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (rejecting contention that only named class representatives must have claims meeting amount in controversy requirement). In those cases, plaintiffs sought an expansion of diversity jurisdiction by judicial interpretation in order to take advantage of claimed class action efficiencies. Rather than accepting the invitation to expand federal court adjudication of state-law claims, the Court in *Snyder* quoted *Healy v. Ratta*, 292 U.S. 263, 270 (1934), as a reminder of the pivotal federalism role played by the diversity statute's limited grant of jurisdiction.

> Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

Snyder v. Harris, 394 U.S. at 340. Consistent with *Healy's* instruction, both *Snyder* and *Zahn* confirmed that Rule 23(b)(3), which permits adjudication of separate and distinct damage claims of numerous plaintiffs in a representative action, was to receive no different treatment than other procedural joinder devices in terms of the diversity statute's amount in controversy limitation.

Following the 1973 ruling in *Zahn*, large diversity-based Rule 23(b)(3) class actions were almost non-existent, in part due to the Note of the Advisory Committee accompanying Rule 23 that discouraged their use in "mass accident" cases arising under state law. More recently, concern has been voiced that conventional adjudication of large numbers of superficially similar tort actions is unduly burdening the judiciary. This concern has led some to advocate a departure from the direction laid down by the Advisory Committee in the hope that Rule 23(b)(3) class actions would alleviate the case loads of individual courts. *See* 3 *Newberg On Class Actions* § 17.06 at 373 (2d ed. 1985) (quoting Professor Charles Alan Wright). Indeed, plaintiffs in the case below have professed to discern a federal court trend toward the use of Rule 23(b)(3) to address so-called mass torts.

Whether or not such a trend actually exists, in addition to the instant "*Schools*" case, a similar nationwide, diversity-based class action complaint is pending on behalf of all colleges and universities for asbestos-in-buildings claims.[4] In late 1990, another class action, also modeled on the asbestos *Schools* case, was filed in the United States District Court for the Eastern District of Pennsylvania to pursue state law claims arising from the presence of lead-based paint in municipal buildings throughout the country.[5] Also, a national diversity-based class action has been proposed as a means of dealing with all of the existing and expected asbestos personal injury claims.[6] And, in a related

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[4] *See Central Wesleyan College v. W.R. Grace & Co.*, C.A. No. 2:87-1860-8 (D.S.C. July 17, 1987). Ironically, Rule 23(b)(3) class action procedures have been proposed in the *Colleges* and the *Schools* cases to promote judicial savings, even though only approximately 250 asbestos-in-buildings cases of all types have ever been filed in federal or state courts.

[5] *See City of Philadelphia v. Lead Industries Ass'n, Inc.*, Civ. No. 90-7064 (E.D. Pa. Nov. 5, 1990). *See also* Legal Times, Jan. 14, 1991, at 1.

[6] *Linscomb v. Pittsburg Corning Corp.*, Civ. No. 1:86-MC-456 (E.D. Tex. July 19, 1990). *See also In re Allied-Signal, Inc.*, 915 F.2d 190 (6th Cir. 1990).

development, the Judicial Panel On Multidistrict Litigation has recently issued an order to show cause why all asbestos personal injury actions pending in federal courts should not be transferred to a single district under 28 U.S.C. § 1407 in order to provide, *inter alia*, "a mechanism for the transferee judges to fully explore the uniform use of dispositive techniques" such as "classes and subclasses under Fed. R. Civ. P. Rule 23."[7]

While to date these other class action initiatives have produced no decisions dealing with subject matter jurisdiction obstacles, the courts below have ruled that the *Schools* litigation may proceed to the merits, even though plaintiffs' complaints disclosed on their face that traditional district court adjudication would be foreclosed by three fundamental limitations on federal jurisdiction—the amount in controversy and complete diversity of citizenship requirements of 28 U.S.C. § 1332(a) and the local action doctrine's traditional restriction against hearing claims for injury to real property located outside the forum state.

When Kaiser Cement raised these jurisdictional defects in its appeal from the LAQ final judgment, the majority opinion of the Court of Appeals swept them under the rug by ignoring prophylactic rules that have been developed over decades to ensure that federal courts operate within their limited authority. Most importantly, the majority failed to discharge the "special obligation" imposed on every federal appellate court to satisfy itself that the district court actually had subject matter jurisdiction. *See Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). Instead, the Court of Appeals adopted the expedient of shifting to defendants the burden of showing a "clear and indisputable lack of subject matter jurisdiction" in the district court. *Compare McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (plaintiff "must carry throughout the litigation the burden of showing that he is properly in court"). In the end, the Court

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[7] *See In re Asbestos Products Liability Litigation (No. VI)*, MDL-875, slip op. at 2 (J.P.M.L., Jan. 17, 1991) (unpublished order).

of Appeals affirmed the final judgment dismissing the claims of all class members against LAQ with prejudice, including the claims of class members as to whom the district court admittedly lacked jurisdiction. *Compare General Investment Co. v. Lake Shore & Michigan Southern Ry. Co.*, 260 U.S. 261, 288 (1922) ("the dismissal, being for want of jurisdiction, should have been without prejudice").

The above-described rulings, if generally accepted, would remove virtually all jurisdictional obstacles to litigating almost any multi-party state law tort claim in federal court through the Rule 23(b)(3) device. Before district courts begin routinely to embark on lengthy class action proceedings in reliance on those rulings, this Court should grant review to clarify and reaffirm that Congress has neither exempted Rule 23(b)(3) class actions from the requirements of 28 U.S.C. § 1332(a) nor authorized other preferential jurisdictional treatment. Guidance on these issues would not only mitigate the waste of resources from continuing to litigate the merits of the present case in federal court, but it would also restrain district courts from succumbing to the temptation to exceed their power in other proposed diversity-based class actions by reconfirming that "[t]he courts, no less than the political branches of the government, must respect the limits of their authority." *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988).

Review in this case would also provide guidance to the Congress as the ultimate arbiter of the extent to which federal courts should be statutorily empowered to hear state law claims. In its decision below, a majority of the Court of Appeals purported to find Congressional support for diversity-based class actions, but the fact of the matter is that Congress has never acted to confer unique jurisdictional status on Rule 23(b)(3) proceedings. Indeed, when the Judicial Improvements Act of 1990 recently expanded the jurisdiction of federal courts in some circumstances by

authorizing the exercise of "supplemental jurisdiction,"[8] Congress took pains to make clear that "supplemental jurisdiction" was "not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*." H.R. Rep. No. 734, 101st Cong., 2d Sess. at 29 (1990) (footnote omitted).[9]

Not coincidently, this Court had previously observed:

> Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretative rules, so that it may know the effect of the language it adopts.

Finley v. United States, 490 U.S. 545, 556 (1989).

Providing such guidance to Congress with regard to diversity-based Rule 23(b)(3) class actions would be particularly timely now. In recent years, Congress has been subject to something like a "judicial reform" tug of war. On the one hand, legislation has been proposed to cut back or eliminate diversity jurisdiction in order to alleviate the work load of federal district courts. On the other hand, new legislation has also been sought to combat the "litigation crisis" by expanding the role of district courts in dealing with the proliferation of lawsuits arising from "mass torts." In the case of this latter school of thought at least, national class actions invoking diversity jurisdiction are frequently portrayed as an attractive tool. Kaiser Cement disagrees with that portrayal because of the dif-

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[8] *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990). The provision of that statute authorizing "supplemental jurisdiction" is applicable to cases filed after the date of enactment of the statute. *Id.* § 310 (adding a new Section 1367 to Title 28).

[9] The footnote omitted from the quotation in the text above reads as follows: "*See Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973)."

ficulty of identifying and applying the governing law of so many jurisdictions and because of the prospect that both plaintiffs' burdens and defendants' rights will be overlooked in the course of such massive class litigation. Regardless of the merits of that debate, Congress should be afforded a clear picture of the current jurisdictional limitations on diversity-based Rule 23(b)(3) class actions to focus future consideration of competing legislative demands for "judicial reform." The instant case presents an opportunity to provide such guidance.

Kaiser Cement's Petition presents a second important issue which merits review by this Court, particularly if multi-defendant class actions that pursue claims arising under the laws of a multitude of states are to continue. This issue arises from the obvious practical reality that some defendants in such actions will settle and from the less obvious consideration that little guidance exists as to when non-settling defendants will be permitted to object to such partial settlements in order to protect their rights. In the case of the present settlement, Kaiser Cement's concern was created by the fact that, following direct appeal, non-settling defendants would be unable to attack the final judgment approving the LAQ settlement, and that, as a matter of law in a number of jurisdictions, the district court's approval extinguished non-settling defendants' contribution rights against LAQ. Reflecting that concern, Kaiser Cement's appellate objections were directed at defects in the notice procedures followed in approving the settlement and were raised in an attempt to determine if the settlement and, in particular, class members' undertakings to reduce future judgments against non-settling defendants would be enforceable in later litigation.

By refusing to pass on Kaiser Cement's objections, the Court of Appeals appears to have adopted a highly restrictive rule that so long as a settlement agreement imposes a facial obligation on class members to reduce future judgments to account for the responsibility of the settling defendant, non-settling defendants have no stand-

ing to object to defects in the process by which that settlement was approved. The result of such a standing rule would be to deprive the trial court of input from those most likely to identify correctable defects in the approval process, particularly where, as here, the complained of defects deprive class members of the information required to enable them to object at the time of the Rule 23(e) settlement hearing. However, after the settlement has been approved and the time comes for honoring obligations that adversely affect their interests, class members will have both opportunity and incentive to discover earlier defects and to attack the enforceability of such obligations.

For non-settling defendants in the present case, the Court of Appeals' standing ruling means that they have lost their contribution rights against LAQ and may ultimately receive no judgment reduction from class members or, at best, may be forced to litigate to enforce that obligation in a series of collateral actions. Such a result is fundamentally at odds with the rationale underlying this Court's ruling in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) that a defendant has standing to ensure the *res judicata* effect of any subsequent judgment by raising objections to the trial court's exercise of personal jurisdiction over absent plaintiff class members. *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172-77 (1974) (ruling on defects in proposed class notice procedure without even questioning defendants' standing to raise such issues). A standing rule comparable to that adopted in *Shutts* is essential in federal class actions to fulfill the promise in Rule 23(b)(3) that such procedures will be both "efficient" and "fair" to all litigants. The Court should issue a writ of certiorari in the present case to achieve that end.

I. REVIEW SHOULD BE GRANTED TO CLARIFY AND REAFFIRM THAT ESTABLISHED JURISDICTIONAL LIMITATIONS APPLY TO DIVERSITY-BASED RULE 23(b)(3) CLASS ACTIONS.

A. The Claim Of Each Member Of A Rule 23(b)(3) Class Must Exceed $10,000.

In *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), this Court affirmed the lower courts' refusal to certify a diversity-based Rule 23(b)(3) class action where the district court found that the claims of some members of the proposed class were less than the jurisdictional minimum and that those class members could not be readily identified. The *Zahn* opinion emphasized that, by permitting the joinder of separate claims of multiple plaintiffs in a single representative action, Rule 23(b)(3) did not alter established limitations on diversity jurisdiction. Each class member's claim is a separate "matter in controversy" and must satisfy the jurisdictional minimum set forth in 28 U.S.C. § 1332(a). *Id.* at 301.

The complaints in the present case explicitly admit that not all members of the class subject to the LAQ judgment have a claim in excess of $10,000. Apart from this admission by plaintiffs, defendants demonstrated in the district court that at least sixty percent of the class members had jurisdictionally insufficient claims. App. 56a-57a & 80a-81a. In the face of this record, the Court of Appeals still permitted the litigation to go forward as to all class members in direct contravention of the directive in *Zahn* that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case." *Id. Compare Newman-Green, Inc. v. Alfonzo-Larrain*, 109 S.Ct. 2218, 2221 (1989) (approving cure of jurisdictional defect where non-diverse party was dismissed as soon as the defect became apparent).

The only justification offered for the court's unprecedented departure from *Zahn* was that, in the contemplated multi-stage trial, a jurisdictional cure could be effectuated

at the damages stage by entering final judgment only as to those class members that proved damages in excess of $10,000. Yet, three months later the district court disregarded this supposed justification when, without proof of damages by any class member, final judgment was entered dismissing the claims of *all* class members against LAQ with prejudice. App. 30a-33a. Given plaintiffs' concession that jurisdiction was lacking as to some class members, the district court's judgment dismissing the claims of such class members *with prejudice* and the Court of Appeals' affirmance are so clearly and indisputably wrong that the judgment should be vacated. *See Armour & Co. v. Fort Morgan S.S. Co.*, 270 U.S. 253, 258 (1926) ("[i]f there was no jurisdiction, the decree should . . . be without prejudice").

B. The Citizenship Of Each Rule 23(b)(3) Class Member Must Be Diverse From That Of Each Defendant.

When two or more plaintiffs join their separate claims against one or more defendants in a single action, this Court has long required that the citizenship of each plaintiff must be diverse from that of each defendant. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) (complete diversity requirement reflects a "congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant").

The statutory language construed in *Kroger*, 28 U.S.C. § 1332(a), authorizes district court jurisdiction over an action when the "matter in controversy" (i) meets the jurisdictional minimum and (ii) is between citizens of different states. *Zahn* held that the claim of each Rule 23(b)(3) class member is a separate "matter in controversy" and therefore must satisfy the amount in controversy requirement. Since each "matter in controversy" must also be between "citizens of different States," it is inescapable from the language of 28 U.S.C. § 1332(a) that each Rule 23(b)(3) class member must also be of diverse citizenship

from each defendant. *See Moore's Federal Practice 1991 Rules Pamphlet*, Part 1, ¶ 23.18.

It is undisputed in this case that many, if not most, class members are citizens of the same state as one or more of the defendants. Nevertheless, the Court of Appeals majority concluded that the district court could exercise jurisdiction over this action. In reaching that decision, the panel did not rely on the language of the diversity statute and understandably did not claim support from any theory of pendent party jurisdiction whereby class members with diverse citizenship could carry those class members who shared citizenship with some of the defendants. App. 44a. In *Finley v. United States*, 490 U.S. 545, 556 (1989), this Court summarized why pendent party jurisdiction would have been unavailing here:

> All our cases—*Zahn*, *Aldinger* and *Kroger*—have held that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties.

See also id. at 574 (Stevens, J. dissenting) (acknowledging holding in *Kroger* that the congressionally-imposed requirement of complete diversity of citizenship cannot be "circumvented through the exercise of pendent jurisdiction").[10]

With no support from the language of 28 U.S.C. § 1332(a) or from theories of pendent party jurisdiction, the Court of Appeals essentially held that Rule 23(b)(3) created a special diversity jurisdiction rule where "only the citizenship of the named class representatives must be

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[10] Although the courts below did not reach the issue, it seems highly unlikely that claims of different members of the present class would "derive from a common nucleus of operative fact" so as to satisfy the Article III requirement for pendent party jurisdiction. *See Finley v. United States*, 490 U.S. 545, 548-49 (1989).

diverse from that of the defendants." App. 48a.[11] The majority opinion made no effort to respond to the obvious objection that Rule 82 expressly denies that any Federal Rule of Civil Procedure extends the jurisdiction of federal courts. Instead, the Court of Appeals relied on the decision in *In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 162 (2d Cir. 1987) and on dicta in *Snyder v. Harris*, 394 U.S. 332, 334 (1969).

Agent Orange is the only other appellate decision that has ever applied a special diversity jurisdiction rule to a Rule 23(b)(3) class action. Like the Court of Appeals here, the court in *Agent Orange* eschewed any explanation of the basis for such a rule and relied instead upon the same dicta in *Snyder v. Harris*. At bottom then, the only claimed support for a Rule 23(b)(3) exception to the complete diversity requirement is *Snyder*, a decision where the parties' citizenship was never at issue.

The sole question before the Court in *Snyder* was whether named plaintiffs and absent members of a Rule 23(b)(3) class could aggregate their separate damage claims to meet the amount in controversy requirement of the diversity statute. Writing for the Court, Justice Black answered that question in the negative. In pure dicta, his *Snyder* opinion also remarked:

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[11] Even then, the Court of Appeals did not explain how the present class action satisfied this "special" rule when, for example, both named class representative Lancaster School District and defendant Pittsburg Corning Corporation are citizens of Pennsylvania.

This lack of even "minimal" diversity occurred because the three complaints below did not name the same array of defendants. Instead, each complaint carefully listed only those companies that were not citizens of the same state as the particular plaintiffs named in that complaint. Having facially complied with the complete diversity of citizenship requirement in their individual complaints, all of the named plaintiffs then secured the district court's certification of a nationwide Rule 23(b)(3) class to proceed against all of the defendants named in any of the three complaints. As a result, named plaintiffs like Lancaster ended up representing the class against defendants like Pittsburg Corning.

> Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own States. *See Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921).

Snyder v. Harris, 394 U.S. at 340. The significance attributed to Justice Black's remark by the Court of Appeals below flies in the face of the admonition, issued almost contemporaneously with the *Snyder* opinion, that "this Court does not decide important questions of law by cursory dicta inserted in unrelated cases." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968). As if to confirm the wisdom of that warning, the only case cited in *Snyder* as support for the described "current doctrine"—*Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921)—was a class action that, unlike either *Snyder* or *Zahn*, did not purport to adjudicate the separate and distinct claims of individual class members. Instead, *Ben-Hur* involved a contest for control of the funds of a fraternal benefit association in which all of the class members "had a common but indivisible interest." *Id.* at 361. In that context, the district court's exercise of diversity jurisdiction was upheld even though some members of the plaintiff class were citizens of the same state as the defendant.

This Court has subsequently described *Ben-Hur* as one of the few Supreme Court cases which has allowed the exercise of "ancillary" jurisdiction over non-diverse claimants who have indivisible interests in a common fund, "bottomed on the notion that since federal jurisdiction in the principal suit effectively controls the property or fund under dispute, other claimants thereto should be allowed to intervene in order to protect their interests, without regard to jurisdiction." *Aldinger v. Howard*, 427 U.S. 1, 11 (1976). *See Finley v. United States*, 490 U.S. 545, 551 (1989).

But ancillary jurisdiction as used in *Ben-Hur* cannot justify the special diversity rule adopted below, because, in a Rule 23(b)(3) class action, there is no common fund and no "indivisible interest" that requires non-diverse claimants to be parties to a single, federal action. In fact, Rule 23(b)(3) expressly recognizes the right of each class member to control litigation of its separate claim by mandating that all class members be afforded the opportunity to exclude themselves and their claims from the class action. Reflecting that distinction, this Court has already foreclosed reliance on principles of ancillary jurisdiction in cases that invoke Rule 23(b)(3) to adjudicate "separate and distinct claims of class members." *See Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978) (*Zahn* rejected the argument that, in a Rule 23(b)(3) diversity class action, "jurisdiction existed over those claims that involved $10,000 or less as ancillary to those that involved more").[12]

The bottom line is that no decision of this Court provides any principled basis for the special diversity rule endorsed by the Court of Appeals below, which would permit a plaintiff to join under Rule 23(b)(3) an unlimited number of additional parties—plaintiffs and defendants—as to whom diversity of citizenship is lacking. On the other hand, this

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[12] The recent dissent in *Carden v. Arkoma Associates*, 110 S.Ct. 1015, 1023 (1990) suggested that a group of partners seeking to enforce their indivisible interests in a contractual right of the partnership might take advantage of ancillary jurisdiction, like the *Ben-Hur* class, to cure their lack of complete diversity. Whether or not ancillary jurisdiction is so expansive, the *Arkoma* dissent does not support the argument that ancillary jurisdiction is available where separate and distinct claims of class members are joined under Rule 23(b)(3).

First, the dissent's reference to ancillary jurisdiction explicitly relied on *Kroger* (*id.* at 1023-24), which had interpreted *Zahn* as rejecting the use of ancillary jurisdiction in Rule 23(b)(3) class actions. Second, under the dissent's proposed "real party to the controversy test," individual Rule 23(b)(3) class members undeniably have the ability to initiate and control litigation as to their separate claims and thus must be counted for purposes of the complete diversity of citizenship requirement. *See id.* at 1026.

Court has never expressly held that Rule 23(b)(3) classes are not exempted from the complete diversity requirement imposed by 28 U.S.C. § 1332(a), thereby leaving the door open for the exercise of judicial power by fiat. The Court should grant review in this case and end the ambiguity.

C. The Local Action Doctrine Requires That Claims For Injury To Real Property Be Adjudicated In The State Where The Property Is Located.

The federal local action doctrine traces to *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811), a tort action for injury to real property, where Chief Justice Marshall held that the complaint must be dismissed because the property was located outside of the forum state. This Court subsequently endorsed the local action limitation on district court jurisdiction recognized in *Livingston*. *See Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 107 (1895); *McKenna v. Fisk*, 42 U.S. (1 How.) 241, 247 (1843).

Although most members of the class in the present case are seeking damages for injury to buildings that are located outside of Pennsylvania, the Court of Appeals concluded that the local action doctrine was inapplicable since "plaintiffs' claims are 'largely tort claims,' which are 'transitory' rather than 'local' in nature" (App. 52a) in that they "are not bound to any issues of title or possession of real property" (App. 53a-54a). In support of that conclusion, the majority opinion cited a single asbestos-in-buildings case in the Eastern District of Texas[13] but did not discuss two conflicting asbestos-in-buildings decisions in the Southern District of Mississippi that applied the local action doctrine and dismissed the complaints on jurisdictional grounds.[14]

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[13] *Dayton Indep. School Dist. v. U.S. Mineral Prods. Co.*, Civ. No. B-87-00507-CA (E.D. Tex. Feb. 14, 1989).

[14] *Trust Company Bank v. United States Gypsum Co.*, Civ. No. S89-0569 (R) (S.D. Miss. Sept. 27, 1990); *Richmond County Hospital Authority v. The Celotex Corp.*, Civ. No. S89-0502 (G) (S.D. Miss. Sept. 14, 1990).

More significantly, the Court of Appeals did not confront the fact that this Court's earlier decisions in *Ellenwood* and *McKenna* simply do not support the "tort claim" versus "title or possession" dichotomy relied on by the Court of Appeals. In *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105 (1895), the complaint sought damages for trespass and cutting of timber and did not involve an effort to recover the title or the possession of the land. *Id.* at 107 ("an action for trespass upon land, like an action to recover the title or the possession of the land itself, is a local action, and can only be brought within the State in which the land lies"). Similarly, *McKenna v. Fisk*, 42 U.S. (1 How.) 240, 247 (1843) held that an action for damage to a small storehouse inflicted by a mob was local.

Both *Ellenwood* and *McKenna* rest on the same common law principles as *Livingston* and, contrary to the opinion of the court below, the "firmly established" distinction between transitory and local actions applied in *Livingston* by Chief Justice Marshall had nothing to do with whether a particular case presents issues of title or possession. Rather, it turned on whether the injury is to a movable subject (personality or the person) and hence "might happen in any place," or to an immovable subject (real property) that is "necessarily local." *Livingston v. Jefferson*, 15 F. Cas. 660, 664 (C.C.D. Va. 1811).[15]

In short, like matters of domestic relations and probate, actions for injuries to out-of-state real property have been excluded from district court jurisdiction since the earliest

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[15] In recognizing this distinction, Chief Justice Marshall followed the "firmly established" rule as it was stated by Blackstone and in an editorial commentary thereon by Chitty. *Id.* The portion of Blackstone cited by Marshall teaches that an action is transitory only if it is "for injuries that might have happened anywhere." 3 Blackstone, *Commentaries on the Laws of England* Ch. XX at 294. Chitty's editorial commentary at note 4 elaborated that "[a]ctions for every kind of injury to real property are local, as for nuisances, waste, etc."

The above quotations are from the version of the Commentaries with notes by Joseph Chitty, published in 1826. Petitioner has been unable to locate the earlier version cited by Chief Justice Marshall.

days of the nation. *See Hayes v. Gulf Oil Corp.*, 821 F.2d 285, 287 (5th Cir. 1987) ("[t]he local action doctrine is so ingrained in our jurisprudence that a claimant does not normally challenge the rule's existence"). That exclusion, as reflected in the *Livingston*, *Ellenwood* and *McKenna* decisions, is flatly inconsistent with maintaining a Rule 23(b)(3) class action in the United States District Court for the Eastern District of Pennsylvania that seeks to recover monetary damages for alleged injuries to buildings located in every state. Reaffirmation by this Court of the local action restriction on district court jurisdiction is needed now not only to redirect the present case but also to prevent the Third Circuit's erroneous interpretation from influencing other massive proposed property damage class actions pending in that Circuit and elsewhere. *See* p. 13 *supra*.

II. REVIEW SHOULD BE GRANTED TO CONFIRM THAT POTENTIALLY INJURED NON-SETTLING DEFENDANTS HAVE STANDING TO RAISE DEFECTS IN RULE 23(e) SETTLEMENT APPROVAL PROCEDURES THAT COULD RENDER THE RESULTING FINAL JUDGMENT UNENFORCEABLE AGAINST CLASS MEMBERS.

There has been no dispute in this case that the claims of each class member must be adjudicated under the substantive laws of the particular jurisdiction in which its buildings are located. Likewise, as to each class member's claim, a defendant's contribution rights vis-a-vis other defendants will be governed by the same state laws. Judge Cowen demonstrated in his dissenting opinion that, under the laws of many of those states, final approval of one defendant's settlement extinguishes the contribution rights of non-settling defendants against that defendant. App. 14a.[16] To compensate for the loss of such rights, the dis-

[16] The existence of state-law contribution rights and the adverse effect of settlement approvals on such rights under state laws make inapplicable class action standing guidelines developed in antitrust litigation, since defendants in such actions have no rights of contribution to lose.

trict court found that class members agreed "to adjust any subsequent recovery from non-settling defendants by any portion of the recovery attributable to LAQ." App. 21a.

The problem for non-settling defendants is that this judgment-reduction obligation will protect them only if it is enforceable against class members. In an effort to deal with that problem, Kaiser Cement's appeal raised several defects in the settlement approval process that jeopardized its binding effect. However, the majority below concluded that non-settling defendants lacked standing to raise such issues on appeal and, as a result, did not deal with the enforceability of the district court's order imposing the judgment-reduction obligation.

The Court of Appeals' standing ruling in this regard is unprecedented and conflicts with this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).[17] In *Shutts*, the defendant challenged the state court's authority to exercise personal jurisdiction over the members of a nationwide opt-out class, including those who had no connection with the forum state. Before reaching that issue, this Court unanimously rejected plaintiffs' contention that the defendant had "no standing to assert the rights of its adversary, the plaintiff class" on appeal. *Id.* at 804. *Shutts*

See, e.g., In re Beef Indus. Antitrust Litigation, 607 F.2d 167, 183 (5th Cir. 1979) (relied upon by the majority below at App. 10a).

[17] In support of its ruling, the Court of Appeals cited (App. 9a-10a) the Ninth Circuit's opinion in *Waller v. Financial Corp. of America*, 828 F.2d 579 (9th Cir. 1987), where the non-settling defendant did not even argue that its contribution rights were affected. By contrast, when approval of a partial settlement affected non-settling defendants' contribution/claim reduction rights, the Ninth Circuit permitted them to appeal and challenge the approval. *See Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1223 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 232 (1990).

The Court of Appeals also quoted (App. 9a) a conclusory statement inserted into the pocket part supplement of a treatise authored by one of plaintiffs' counsel herein. As the dissent observed, this conclusory statement had been added to the treatise during the pendency of the present case. App. 16a-17a.

reasoned that the only way a defendant in a class action can assure itself of the binding effect of a judgment

> is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.

Id. at 805. In the present case, Kaiser Cement sought to ascertain whether the notice procedures followed in the district court were adequate, because inadequate notice here, like the possible lack of personal jurisdiction in *Shutts*, could prevent the LAQ settlement and plaintiffs' related obligation to reduce any future judgment from having any res judicata effect on class members. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (class member must be given notice of the proceeding so that it can choose "whether to appear or default, acquiesce or contest"); *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 834 (3d Cir. 1973) (settlement notice procedures defective; all settlement orders vacated).[18]

The majority's refusal to resolve these issues not only departs from *Shutts* but it also cannot be squared with Rule 23(b)(3)'s requirement that the class action device must be superior to other available methods "for the fair and efficient adjudication of the controversy." As Judge Cowen underscored in his dissenting opinion:

> It is patently unfair to place the non-settling defendants in the position in which they now find themselves—having to accept a potentially unen-

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[18] Indeed, as a different panel of the Court of Appeals for the Third Circuit has recognized:

> If the defendant wishes to achieve maximum preclusive effect, it is up to the defendant to ensure that the class is appropriately certified, and the absent members are adequately represented.

In re Real Estate Title & Settlement Services Antitrust Litigation, 869 F.2d 760, 770 (3d Cir.), *cert. denied*, 110 S.Ct. 77 (1989).

> forceable right to set-off in exchange for the contribution or indemnity remedies they would otherwise have.

App. 20a. And, with the enforceability of the LAQ final judgment left up in the air, the prospects for subsequent lawsuits by disgruntled class members are significantly enhanced, thereby undercutting any claimed efficiencies for the instant class action. To ensure that this and other diversity class actions will indeed be fair and efficient, the Court should grant review to confirm the standing of non-settling defendants to protect their rights to contribution under state laws.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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